

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20030172-CA
v.)	
)	F I L E D
Darren Neil Grueber Jr.,)	(November 10, 2005)
)	
Defendant and Appellant.)	<u>2005 UT App 480</u>

Third District, Salt Lake Department, 011916865
The Honorable Robin W. Reese

Attorneys: Jennifer Gowans, Provo, for Appellant
Mark L. Shurtleff and Matthew D. Bates, Salt Lake
City, for Appellee

Before Judges Billings, Greenwood, and McHugh.

GREENWOOD, Judge:

Defendant Darren Neil Grueber Jr. appeals his conviction for murder, a first degree felony, in violation of Utah Code section 76-5-203, see Utah Code Ann. § 76-5-203 (2003), and aggravated kidnapping, a first degree felony, in violation of Utah Code section 76-5-302, see id. § 76-5-302 (2003). We affirm.

Defendant first argues that his trial counsel was ineffective because counsel failed to conduct a reasonable investigation, i.e., obtaining and listening to audio tapes of Defendant's telephone conversations that undermined the defense strategy. Defendant asserts that this failure prejudiced him because it deprived him of the benefit of a plea bargain. Where a trial court rules on a defendant's ineffective assistance of counsel claim at a remand hearing pursuant to rule 23B of the Utah Rules of Appellate Procedure, see Utah R. App. P. 23B, the defendant's "ineffective assistance claim on appeal presents us with a mixed question of law and fact." State v. Classon, 935 P.2d 524, 531 (Utah Ct. App. 1997). "Accordingly, we defer to the trial court's findings of fact, but review its legal conclusions for correctness." Id.

To demonstrate ineffective assistance of counsel, as guaranteed by the Sixth Amendment, "a defendant must show (1)

that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'" Myers v. State, 2004 UT 31, ¶20, 94 P.3d 211 (quotations and citations omitted); see also Strickland v. Washington, 466 U.S. 668, 687-96 (1984). "Failure to satisfy either prong will result in our concluding that counsel's behavior was not ineffective." State v. Diaz, 2002 UT App 288, ¶38, 55 P.3d 1131.

Applying these principles to the present case, we conclude that Defendant's claim fails because he suffered no prejudice. See State v. Dunn, 850 P.2d 1201, 1226 (Utah 1993) ("[W]hen confronted with a claim of ineffective assistance, we may choose not to consider the adequacy of counsel's performance if we determine that any claimed error was not harmful."). Defendant argues that he was prejudiced because, but for his trial counsel's failure to investigate and discover the defects in the defense strategy, Defendant would have accepted the plea bargain offered by the State--to drop the charge of aggravated kidnapping in exchange for Defendant pleading guilty to murder. However, Defendant "loses sight of the fact that our state and federal constitutions guarantee fair trials, not plea bargains." State v. Geary, 707 P.2d 645, 646 (Utah 1985); see, e.g., Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) ("Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."). "We have previously rejected claims alleging ineffective assistance of counsel when a defendant has rejected a plea bargain and has retained his or her right to a fair trial." State v. Knight, 734 P.2d 913, 919 n.7 (Utah 1987).

These cases are dispositive. Indeed, the ineffective assistance of counsel claim rejected in Knight--"that counsel could not advise [the defendant] effectively as to the wisdom of accepting or rejecting plea bargain offers without the information that was withheld by the prosecution," id.--is similar to Defendant's claim. Defendant does not contend that he was denied his right to a fair trial but only "that he was prejudiced by his [trial] counsel['s] deficient performance during the plea bargaining process." However, because Defendant has no right to a plea bargain, see Geary, 707 P.2d at 646, he could not be prejudiced by any purported deficient performance during the plea bargaining process. Accordingly, Defendant's claim for ineffective assistance of counsel fails.

Defendant also challenges the trial court's finding that Defendant was not prejudiced by his counsel's failure to listen to the audio tapes because "[D]efendant would not have accepted the plea offer from the State because he did not want to plead

guilty to [m]urder."¹ We review a trial court's factual findings for clear error. See State v. Pena, 869 P.2d 932, 935 (Utah 1994). "For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." Id. at 935-36. Also, "[i]t is the province of the trier of fact to assess the credibility of witnesses." Cooke v. Cooke, 2001 UT App 110, ¶11, 22 P.3d 1249 (alteration in original) (citation and quotations omitted).

The trial court's finding is supported by the record. Although Defendant testified that he would have accepted the plea offer had he known of the recordings and their effect on his case, both of his attorneys testified that they didn't believe Defendant would accept a plea that involved murder because having the aggravated kidnapping charge dropped would have little impact on his sentence.² The trial court exercised its discretion in believing the attorneys' testimony instead of Defendant's testimony. This finding is not clearly erroneous. Therefore, even considering the facts of the case, Defendant suffered no prejudice from his counsel's alleged failure to investigate because he would not have accepted the guilty plea.

Accordingly, Defendant's conviction is affirmed.

Pamela T. Greenwood, Judge

WE CONCUR:

Judith M. Billings,
Presiding Judge

Carolyn B. McHugh, Judge

¹This finding bolsters our conclusion that Defendant was not prejudiced by his trial counsel's performance.

²For example, David Shapiro, one of Defendant's attorneys, testified that from his conversations with Defendant, he "believed that [Defendant] said he wasn't going to plead guilty to first-degree murder, and we would go to trial if that's the best they were going to offer."